Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of the Georgia Court of Appeals' defiance of this Court's prior GVR order (which called for a *de novo* due-process review of a $257 million punitive damages verdict), summary reversal is appropriate.

2. Whether, in the alternative, this Court should set this case for plenary consideration of the court of appeals' application of the guidepost analysis of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and, specifically, of two issues that are subject to conflicting authority:

   (a) whether, under *BMW*'s third guidepost, courts may consider not only statutes providing for penalties in fixed amounts but also statutes calling for treble damages; and

   (b) whether, under that same guidepost, courts must consider not only statutory penalties but also punitive damages awards.

3. Whether the Court should grant, vacate, and remand for further consideration in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (U.S. argued Dec. 11, 2002).

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Time Warner Entertainment Company, L.P., Six Flags Entertainment Corporation, Six Flags Theme Parks Inc., and Six Flags Over Georgia, Inc., were defendants and appellants in the proceedings below.

Respondents Six Flags Over Georgia LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee for the Six Flags Claims Trust, were plaintiffs and appellees in the proceedings below.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by AOL Time Warner Inc., a publicly held company. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is indirectly held by Comcast Corp., a publicly held company.

Six Flags Entertainment Corporation is currently known as Six Flags Operations Inc. but for the sake of simplicity will herein be called Six Flags Entertainment Corporation (as it was by the courts below). Six Flags Operations Inc. is wholly owned by Six Flags, Inc. (formerly known as Premier Parks Inc.), a publicly held company. Six Flags, Inc., has no parent company, and no publicly held company owns 10 percent or more of its stock.

Six Flags Theme Parks Inc. is wholly owned by Six Flags Operations Inc.

Six Flags Over Georgia, Inc., is wholly owned by Six Flags, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Time Warner Entertainment Company, L.P., Six Flags Entertainment Corporation, Six Flags Theme Parks Inc., and Six Flags Over Georgia, Inc., respectfully petition for a writ of certiorari to the Georgia Court of Appeals.

This is another case involving big out-of-state companies (as the lower court put it, "corporate entities with collective assets measured in billions of dollars," Pet. App. 15a) getting hit with an outsized punitive damages award in state court, here $257 million.[1] The ostensible justification for that award was to punish petitioners for non-violent conduct (a supposed breach of fiduciary duties between

[1] Because Georgia law provides for a statutory interest rate of 12 percent (well above the market rate), *see* O.C.G.A. § 7-4-12, the award now — four years later — stands at more than $380 million. At more than $84,000 per day, petitioners are paying a steep price for their belief in the correctness of their due process arguments.

business partners) that caused only economic harm. Respondents are sophisticated investors who realized a 100-fold return on their investment, but claim that petitioners should have been able to earn them even more.

This case thus epitomizes "punitive damages . . . run wild." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (internal quotation marks omitted). It is part of the recent epidemic of state-court decisions that, by arbitrarily redistributing senseless amounts of wealth from out-of-state companies to local interests, undermine respect for the rule of law. In that sense, it is just like *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) ($2 million award for failure to inform buyer that car had been repainted), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (U.S. Mar. 6, 2002) ($145 million award for failure to settle within limits of $50,000 insurance policy).

What makes this case special even within that category of cases is that this case passed through this Court once before. On that previous occasion, this Court first issued a stay and then granted, vacated, and remanded ("GVR'd") for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). In *Cooper*, the Court had held that appellate courts must subject punitive damages awards to a *de novo BMW* review and had re-emphasized the exacting nature of that review.

On remand, however, the Georgia Court of Appeals proceeded to defy this Court's directives. The court of appeals denounced this Court's punitive damages jurisprudence as a "br[eak] with common law tradition" and a "dangerous development." Pet. App. 7a, 8a. Next, the court of appeals held that petitioners had somehow waived the federal claims that were the subject of the GVR — even though it had not noted any waiver obstacle when

the case was before it the first time. As an alternative reason for defeating petitioners' federal claims, the court of appeals also purported to conduct an abbreviated excessiveness review that reduced *BMW* to a nullity. Despite the court of appeals' defiance, the Georgia Supreme Court (over the dissent of two justices) declined to intervene.

The case has therefore regrettably returned here. This Court should summarily reverse, rule that petitioners' is simply not the kind of conduct that could justify a $257 million fine, and remand for a determination of the constitutionally permissible amount. In the alternative, the Court should set the case for argument, both to address the court of appeals' application of the three *BMW* guideposts and to resolve two conflicts of authority that have arisen under *BMW*'s third guidepost. At a minimum, the Court should GVR in light of *State Farm*.

OPINION BELOW

The remand opinion of the Georgia Court of Appeals (Pet. App. 1a-16a) is reported at 563 S.E.2d 178. The prior opinion of the Georgia Court of Appeals (Pet. App. 21a-57a) is reported at 537 S.E.2d 397.

JURISDICTION

The Georgia Court of Appeals entered its judgment on remand from this Court on March 29, 2002. Pet. App. 1a. The Georgia Supreme Court denied a petition for a writ of certiorari on September 16, 2002, *id.* at 17a, and denied a motion for reconsideration on October 11, 2002, *id.* at 18a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall

. . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

STATEMENT

1. This case involves a business dispute between partners in a limited partnership formed in 1967 to run the Six Flags amusement park near Atlanta, Georgia. *See* Pet. App. 23a-24a. Respondents are the limited partner (itself a partnership of wealthy investors) and certain related parties. Petitioners are the general partner and the companies that were its corporate parents at the time of the relevant events.[2] Under the partnership agreement, the limited partner would contribute an initial investment, and the general partner was to manage and operate the park. Although the partnership was designed as a tax shelter for the limited partners, it turned out to be fabulously successful as an investment: respondents saw the value of their initial contribution multiply 100-fold to more than $300 million by the time this case arose, and received cash distributions of almost $600 million along the way. *See id.* at 62a.

The partnership agreement granted the general partner "exclusive control of the management of the business and affairs of the limited partnership," *id.* at 23a, including the responsibility for determining how much of each year's revenue to re-invest in capital improvements (*e.g.*, new rides and other attractions). The agreement required the

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[2] In most of the relevant time period, applicant Time Warner owned about half the stock in Six Flags Entertainment Corporation, which owned all the stock in Six Flags Theme Parks Inc. (the holding company for all seven Six Flags theme parks in the United States), which in turn owned all the stock in the general partner in the Georgia park, Six Flags Over Georgia, Inc. *See* Pet. App. 23a. In 1998, Time Warner sold its interests in all Six Flags entities to a third party, *see id.* at 28a, but retained the liability here at issue.

general partner to make "minimum capital improvements" of $800,000 each year. *Id.*[3] It contained no provisions requiring the general partner to invest more than that, or generally to maximize the park's profits. Such duties would have run counter to the partnership's purpose as a tax shelter, the text of the $800,000 capital improvements clause, and the language and purpose of another clause, which required the general partner to keep the park open each season only long enough to earn the limited partner a $2.1 million distribution.

The partnership agreement was set to expire in 1997. *See id.* at 23a. At that time, ownership of the entire park would revert to the limited partner, and the limited partner could either sell it or find a new general partner. *See id.* In 1996, the limited partner invited a number of theme-park-management companies, including the incumbent general partner (one of the petitioners here), to vie for the right to become the new general partner. Ultimately, the limited partner selected the incumbent, and the parties signed a new 30-year agreement. *See id.* at 28a. As part of the deal, respondents received about $300 million in value, *see id.* at 53a, which, in a contemporaneous document, respondents characterized as a "grand slam plus," *id.* at 64a.

2. After the agreement was signed, respondents claimed in a lawsuit in Georgia state court that the general partner, aided and abetted by its corporate parents, had for years

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[3] The relevant clause required the general partner "to install and construct minimum Capital Improvements in the Amusement Park in an amount equal to the lesser of 10% of the Proceeds for the immediately pr[e]ceding calendar year (after deducting therefrom the amount of any sums loaned to the limited partnership during such immediately preceding calendar year) or $800,000." Pet. App. 37a n.5.

breached its fiduciary duties. *See id.* at 22a & n.2, 28a. According to respondents, the general partner — the same entity that they had just made their fiduciary for another 30 years — had purposely mismanaged the park between 1992 and 1997. In particular, respondents claimed, petitioners had purposely delayed from 1995 to 1997 the installation of a popular roller coaster called "Batman the Ride." Respondents claimed that installing the ride (which cost about $9 million) would have boosted profits by $12 million per year. *See id.* at 29a-31a. In addition, respondents claimed, the general partner had engaged in certain financial improprieties that harmed the partnership.[4]

As a result of petitioners' conduct, respondents alleged, they had suffered injury of hundreds of millions of dollars. This was so, they argued, because theme parks are usually bought and sold at about 12 times the previous year's profits. *See id.* at 28a-30a. Thus, respondents argued, if petitioners had managed the park properly (and had installed the Batman ride), the 1997 profits would have been $12 million higher, so that respondents would have received 12 times $12 million (or $144 million) more in the 1997 deal. *See id.* at 31a, 53a-54a. Respondents also claimed that petitioners owed the partnership another $50

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[4] In particular, respondents claimed that Time Warner had received a $20 million fee from Coca-Cola (for a promise to sell only Coca-Cola beverages at all Six Flags parks nationwide) without giving the Georgia partnership its share (about $3 million) at the time it was received. *See* Pet. App. 24a, 32a, 54a. Respondents also claimed that petitioners had overcharged the partnership for $4 million in corporate overhead expenses. *See id.* at 31a-32a, 54a. Finally, respondents charged that petitioners had sold the partnership a roller-coaster named "Viper" for $1 million more than it was worth. *See id.* at 27a, 32a, 54a. Based on these allegations, respondents asserted a conversion claim in addition to their breach of fiduciary duty claim, but the jury returned a verdict for petitioners on the conversion claim. *See id.* at 22a n.2.

million, on the theory that petitioners had invested the few million of supposedly misappropriated Coca-Cola funds in opportunities that proved lucrative, and that respondents were entitled to a constructive trust on the profits. *See* Pet. App. 52a n.6, 54a.

Petitioners disputed that the general partner had under-invested in the park, and demonstrated that it had postponed installing "Batman the Ride" because it feared (correctly, as it turned out) that the 1996 Olympics would draw crowds away from the park. *See id.* at 27a, 63a-64a. Petitioners argued that, in light of the partnership agreement's express language (including the clauses requiring an investment of only $800,000 annually and authorizing the general partner to close the park after earning a fixed amount) and its underlying purpose to create a tax shelter, the law could not impose an amorphous duty to maximize the park's profits through maximum capital investment under the rubric of "fiduciary duty" law. And it was undisputed that the general partner had easily satisfied its contractual duty to invest $800,000 per year. *See id.* at 40a-41a, 63a-64a.

After a trial in which the court refused to admit much of the relevant evidence proffered by petitioners,[5] the jury returned a verdict for the plaintiffs in December 1998. It awarded about $149 million to the limited partner in connection with the capital-improvements claim and about

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[5] For example, the trial court suppressed evidence that the parties' purpose in entering the partnership was to create a tax shelter — on the theory that it might prejudicially draw the jury's attention to respondents' wealth. *See* Pet. App. 43a. And, as punishment for a supposed discovery violation, the trial court refused to permit petitioners to adduce evidence that plainly showed that the supposedly misappropriated funds were not invested in the lucrative ventures to which respondents pointed. *See id.* at 45a-47a.

$48 million to the partnership in connection with both the capital improvements claim and the financial improprieties claims — for a total of more than $197 million in compensatory damages. *See* Pet. App. 22a. The jury then added another $257 million in punitive damages. *See id.* at 22a & n.3. Only $1 million of that sum was awarded against the general partner, the entity in privity with respondents; the remaining $256 million was awarded against the general partner's corporate parents, including $245 million against Time Warner. *See id.* The punitive award was more than 30 times greater than the next-largest punitive award that had been affirmed on appeal in Georgia. *See id.* at 68a.

Nevertheless, the trial court refused to set the verdict aside. In particular, the trial court rejected petitioners' argument that the punitive damages award was so excessive as to violate petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In its sole comment addressing punitive damages, the trial court stated that "the awards of compensatory and punitive damages, both separately and collectively are not so clearly excessive as to be inconsistent with the preponderance of the evidence." Order on Defendants' Amended Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial at 3 (Apr. 22, 1999). The trial court did not further elaborate.

3. The Georgia Court of Appeals affirmed the trial court's rulings in all respects, finding each of petitioners' appellate arguments to be meritless, to have been waived, to involve harmless error, or, in many cases, all three. *See* Pet. App. 21a-56a. According to the court of appeals, the $800,000 in the agreement was merely a *minimum* investment amount. *See* Pet. App. 37a-38a. Because Georgia law imposed a fiduciary duty to treat one's partners in the "utmost good faith," *id.* at 33a, 39a-40a,

the court held, the jury was entitled to find that the general partner was under "a duty to maximize the performance" of the park, *id.* at 40a, and thus was required to invest more. The court of appeals was not disturbed by the imposition of liability on the general partner's corporate parents. Although the court acknowledged that Georgia case law had "never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty," *id.* at 34a, the court held that such a cause of action had been "implicit" in Georgia law, *id.* at 35a. And, although petitioners had argued that the punitive damages award was grossly excessive in violation of their federal due process rights, *see id.* at 69a-70a, the court of appeals rejected all challenges to the award, *see id.* at 55a-56a.

Despite the importance of the case and the massive amount in controversy, the Georgia Supreme Court denied certiorari without comment. Petitioners subsequently paid the compensatory award of almost $200 million (nearly $250 million with interest), but, despite Georgia's high statutory post-judgment interest rate, *see supra*, p.1 n.1, continued their efforts to overturn the punitive damages award.

4. After the court of appeals denied petitioners a stay, petitioners filed a stay request in this Court, which was granted. *See* Pet. App. 58a. Petitioners subsequently filed a petition for a writ of certiorari, asking this Court to GVR for further consideration in light of *Cooper*. In *Cooper*, the Court had held that an appellate court "should apply a *de novo* standard of review" in evaluating a trial court's *BMW* analysis. 532 U.S. at 436. *Cooper* also re-emphasized the exacting nature of the review required by *BMW*, providing detailed instructions on how reviewing courts should apply the *BMW* guideposts. *See id.* at 441-43. Respondents' brief in opposition argued that petitioners had abandoned any *Cooper* claim by failing to present it

properly to the court of appeals. Nevertheless, this Court GVR'd "for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001)." *Id.* at 59a.

5. On remand, the court of appeals reinstated its previous opinion. *See* Pet. App. 2a, 12a. The court of appeals criticized this Court's framework for reviewing punitive damages as an "imperfect . . . attempt to evaluate punitive damages," *id.* at 10a n.6, and as "avoid[ing] the application of the Seventh Amendment," *id.* at 7a. The court of appeals characterized the Court's approach as a "br[eak] with common law tradition," *id.*, and a "dangerous development," *id.* at 8a (internal quotation marks omitted). The court of appeals therefore stated that it would not adopt *Cooper* as a matter of state law: a trial court's state-law excessiveness analysis would continue to be reviewed only for abuse of discretion. *See id.* at 6a-8a.

And the court of appeals held that it was not required to apply *Cooper* even as a matter of federal law. That was so, according to the court of appeals, because petitioners had abandoned in their original appeal *any* federal due process claim. According to the court of appeals, petitioners' opening brief in the previous round had "failed to cite to any relevant facts, give record citations, or present any legal analysis supporting [the due process claim]." *Id.* at 11a. The court of appeals so held even though the brief in question contained a lengthy background section replete with facts and record citations and, in the argument section, expressly invoked *BMW* and detailed the various reasons why the verdict was excessive. *See id.* at 63a-70a.

To reach its waiver determination, however, the court first needed to eliminate another obstacle. In *Kent v. White*, 559 S.E.2d 731, 736-37 (Ga. Ct. App. 2002), a decision announced just two months earlier, a panel of the

court of appeals had held that a *Cooper* claim cannot be waived, even where an appellant's brief contains no federal claim at all. The court of appeals' solution to this problem was simply to overrule *Kent*. *See* Pet. App. 5a-6a.[6] Not a single member of the *Kent* panel dissented to protest the overruling of the two-month old precedent.

The court of appeals declined to rest solely on waiver: it went on to conduct a cursory *BMW* analysis, finding that each of the three *BMW* guideposts militated in favor of the verdict. In connection with *BMW*'s first guidepost (concerning reprehensibility), the court termed petitioners' conduct "especially reprehensible" — on the theory that their "intentional breach of [their] fiduciary duty revealed a callous indifference to the financial well-being of [their] limited partners and their individual investors." *Id.* at 12a-13a. In connection with *BMW*'s second guidepost (concerning the relationship between punitive award and actual harm), the court of appeals held that, in light of the $200 million compensatory award, there was no "shocking disparity." *Id.* at 14a (internal quotation marks omitted). Finally, in connection with *BMW*'s third guidepost (requiring a comparison to other civil fines and penalties), the court of appeals held that petitioners had been put on notice of the possibility of a large punitive damages award by state laws threatening treble damages for RICO and other crimes, which, according to the court, addressed "comparable corporate misbehavior." *Id.* at 15a-16a & n.10.

Following their defeat in the court of appeals, petitioners returned to the Georgia Supreme Court to seek a writ of certiorari. Despite the important legal issues presented, the Georgia Supreme Court — over two dissents

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[6] This is apparently why the court of appeals handed down an opinion signed by all judges. *See* O.C.G.A. § 15-3-1(c)(2).

— again denied certiorari without explanation. *See id.* at 17a. The court likewise denied reconsideration. *See id.* at 18a. Following the denial, respondents consented to a stay pending review in this Court, and filed a joint motion with the court of appeals. But even that request was denied, in an order stating that "[i]t is the general policy of this Court not to stay remittiturs on applications for Certiorari to the United States Supreme Court." *Id.* at 19a. The trial court finally agreed to postpone issuance of its judgment.

REASONS FOR GRANTING THE WRIT

I. IN LIGHT OF THE GEORGIA COURTS' REFUSAL TO FOLLOW THIS COURT'S DIRECTIVES, SUMMARY REVERSAL IS IN ORDER.

This Court previously remanded to the Georgia Court of Appeals for further consideration in light of *Cooper*. *Cooper* is the most recent in a line of cases decided over the past decade in which this Court has recognized increasingly stringent due-process limitations on punitive-damages awards in state courts.[7] Under those decisions, courts must overturn a punitive-damages award that is "grossly excessive," as judged by three guideposts: (1) "the degree of reprehensibility" of the defendant's conduct, (2) "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award," and (3) "the difference between [the punitive damages] remedy and the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 574-75. *Cooper* added that appellate courts must review lower courts' application of these guideposts *de novo*: a "thorough, independent re-

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[7] *See Cooper*, 532 U.S. 424; BMW, 517 U.S. 559; *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

view" of the lower court's determination is required. 532 U.S. at 441. *Cooper* further provided important guidance concerning the practical application of the three *BMW* guideposts by correcting a lower court's analysis. *See id.* at 441-43.

A. Instead of reconsidering its prior decision in good faith, the Georgia Court of Appeals expressed its disagreement with this Court's precedents and issued a fresh decision that effectively defied this Court's directives. The court of appeals began by quarreling with this Court's punitive damages jurisprudence, which the court viewed as "avoid[ing] the application of the Seventh Amendment," Pet. App. 7a; a "br[eak] with common law tradition," *id.*; an "imperfect . . . attempt to evaluate punitive damages," *id.* at 10a n.6; and a "dangerous development," *id.* at 8a. For these reasons, the court of appeals refused to adopt *Cooper*'s reasoning as a matter of *state* law, holding that Georgia appellate courts should continue to review state-law challenges to punitive damages awards deferentially. *See id.*

Presumably for the same reasons, the court refused to conduct the *de novo* review required by federal law and dictated by this Court's GVR. According to the court of appeals, petitioners had waived any claim that the award violated federal due process when, in their court of appeals brief in the previous round of review, they "failed to cite to any relevant facts, give record citations, or present any legal analysis supporting that assertion." *Id.* at 11a.

That waiver ground is entirely imaginary. The brief in which petitioners supposedly abandoned their federal claims contained numerous pages of factual background that were replete with record citations. *See id.* at 60a-67a. No previous Georgia decisions suggest that record citations must somehow be repeated in a brief's argument section.

And any such requirement would be directly contrary to the Georgia Legislature's injunction that appellate practice rules must be "liberally construed so as to bring about a decision on the merits of every case appealed." O.C.G.A. § 5-6-30; *see also Felix v. State*, 523 S.E.2d 1, 3 (Ga. 1999) (appellate practice rules are not intended "to set traps and pitfalls by way of technicalities") (internal quotation marks omitted).

As for legal analysis, petitioners' court of appeals brief expressly stated: "The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the injury here 'was purely economic in nature', and Defendants' conduct 'evinced no indifference to or reckless disregard for the health and safety of others'. *Id.* at 576." Pet. App. 70a. That passage was part of a three-page section (captioned "The trial court erred by failing to set aside the punitive damages award.") that also argued that the punitive damages award ran afoul of analogous principles of state law. The argumentation adduced in support of petitioners' state-law claims applied equally to the federal argument: that "[t]his case did not involve . . . fraud," *id.* at 69a; that the award was "over *30* times larger than the largest punitive damages award ever paid in this state — the $8 million award where plaintiff's decedent was engulfed in a ball of fire caused by the defendant's knowing design of an automobile with an unsafe fuel system," *id.* at 70a; that "the $257 million was awarded primarily because Defendants installed a roller coaster three years later than Plaintiffs wished," *id.*; and that "Defendants' conduct involved no 'personal injury or death' (or even a *risk* of injury or death)," *id.*

Quite apart from its facial invalidity, the court of appeals' waiver holding is remarkable for four additional reasons. *First*, the court of appeals did not invoke its

broad waiver ground when this case was before it the first time.[8] Indeed, even respondents, whose able counsel have advanced waiver arguments at every turn, never pressed the ground adopted by the court of appeals. Respondents did not argue waiver in the court of appeals the first time around, instead addressing petitioners' *BMW* argument on the merits. Similarly, respondents did not rely on the court of appeals' waiver ground in opposing review in either the Georgia Supreme Court, in this Court, or on remand in the court of appeals. To the contrary, respondents were compelled to concede "the proper presentation of some due process claims under *BMW*."[9] Indeed, even in opposing petitioners' certiorari petition in the Georgia Supreme Court, respondents could not bring themselves to defend the court of appeals' waiver holding.

Second, the court of appeals' waiver holding is suspect because, although the court of appeals held the federal excessiveness claim waived, it did not similarly hold petitioners' state common law excessiveness claim waived.

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[8] *See* Pet. App. 56a; *cf. Williams v. Planned Parenthood Shasta-Diablo, Inc.*, 520 U.S. 1133, 1136 (1997) (Scalia, J., dissenting from denial of certiorari) (particular cause for concern exists where "the grounds asserted by state courts as a basis for rejecting constitutional claims . . . are newly minted after a remand, contradict what was said before the remand, and bear indication of an attempt to evade the consequences of our holding prompting the remand").

[9] Brief for Six Flags Over Georgia, LLC, *et al.* in Opposition at 18, No. 00-1875 (U.S. filed Aug. 14, 2001) ("Br. in Opp."). Respondents did advance waiver arguments, but they were different than that embraced by the court of appeals. In particular, respondents argued that petitioners had failed expressly to ask the court of appeals for the *de novo* review mandated by *Cooper*; that petitioners forfeited all constitutional arguments when they appealed to the court of appeals instead of directly to the Georgia Supreme Court; and that the "standard of review" section of petitioners' court of appeals brief invited abuse-of-discretion review. *See id.* at 12-20.

See Pet. App. 12a; 55a-56a. The court of appeals addressed the state-law claim even though it was supported by the same number of citations to record materials as petitioners' federal claim. Plainly, state courts may not "avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).

Third, the court of appeals' waiver holding is dubious because of its abrupt, and unexplained, overruling of its own precedent on preservation of federal-law claims like this one. In *Kent*, the court of appeals had held — just two months before the decision in this case — that an appellant did not waive a *Cooper* claim when his brief contained no federal argument at all. *See Kent*, 559 S.E.2d at 736-37. None of the judges who had sat on the *Kent* panel explained why the reasoning found persuasive in *Kent* had lost all its attraction in the intervening 60 days.

Finally, the court of appeals' waiver holding is incompatible with this Court's GVR order. In their brief in opposition to petitioners' prior certiorari petition in this Court, respondents argued extensively that petitioners' *Cooper* argument had been waived. *See supra*, p.15 n.9. Respondents further argued that, because of the supposed waiver, this Court lacked jurisdiction. *See* Br. in Opp. at 3 ("[T]his Court lacks jurisdiction . . . because the federal questions Petitioners now raise were not presented to or decided by the Georgia Court of Appeals."). This Court nevertheless granted certiorari — presumably after considering its jurisdiction. By issuing its GVR order, then, the Court necessarily implied a determination that petitioners' *BMW* claims — of which petitioners' *Cooper* claims were merely a subset — were properly preserved. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (Court "has the power to remand to a lower federal court any case

raising a federal issue *that is properly before [it]*") (emphasis added).

For all these reasons, the court of appeals' waiver ruling does not constitute an adequate and independent state ground: it does not reflect a procedural rule that is applied consistently and impartially.[10] To the contrary, the court of appeals' reliance on a facially meritless waiver ground, together with its express antagonism to this Court's punitive damages jurisprudence, suggests that its holding was a pretext to camouflage defiance of this Court's directives.

B. The court of appeals' unwillingness to follow this Court's instructions is further evident from its facially insufficient *BMW* analysis. As for *BMW*'s first guidepost, the court of appeals' characterization of petitioners' conduct as "especially reprehensible" is strained. There was no violent conduct or bodily harm in this case — only financial injury. The conduct alleged (the supposed breach of fiduciary duty consisting of a failure to earn respondents even more than the 100-fold return they did realize) was barely even tortious: it would not have been but for the

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[10] *See, e.g., Ford v. Georgia*, 498 U.S. 411, 424 (1991) ("The Supreme Court of Georgia's application of [waiver] to the case before us does not even remotely satisfy the requirement . . . that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been firmly established and regularly followed by the time as of which it is to be applied.") (internal quotation marks omitted); *Osborne v. Ohio*, 495 U.S. 103, 125 (1990) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.") (internal quotation and brackets marks omitted); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("state procedural requirements which are not strictly or regularly followed cannot deprive [the Court] of the right to review").

"partnership" label on the parties' business agreement.[11] Moreover, even assuming the court of appeals was correct in rejecting petitioners' reading of the partnership agreement as expressly permitting them to limit annual investment to $800,000, that reading was certainly reasonable.[12] Likewise, the corporate parents had no reason to

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[11] *See ServiceMaster Co. v. Martin*, 556 S.E.2d 517, 521-23 (Ga. Ct. App. 2001) (no punitive damages allowed in connection with claim for breach of good-faith-and-fair-dealing duty). Indeed, even in a contract captioned "partnership agreement," parties can eliminate any fiduciary duties that might otherwise exist by inserting a single sentence to that effect. *See, e.g., Westminster Properties, Inc. v. Atlanta Assocs.*, 301 S.E.2d 636, 638 (Ga. 1983) ("as between partners the intent of the parties is the true test, and a partnership may be created by a contract giving rights or imposing obligations differing from those which the law ordinarily infers"). That is of course precisely what the parties intended to accomplish in the $800,000 clause.

[12] *See, e.g., Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, No. 372, 2001, 2002 WL 31303135, at *5 (Del. Aug. 29, 2002) ("only in situations where the partners have not expressly made provisions in their partnership agreement" will courts "look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence") (internal quotation marks omitted); *Wilmington Leasing, Inc. v. Parrish Leasing Co.*, Civil Action No. 15202, 1996 WL 752364, at *14 (Del. Ch. Dec. 23, 1996) ("Where, as here, a partnership agreement specifically addresses the rights and duties of the partners, any fiduciary duty that might be owed by the . . . Partners is satisfied by compliance with the applicable provisions of the partnership agreement."); *see also In re Cencom Cable Income Partners, L.P. Litig.*, No. 14634, 1997 WL 666970, at *4 (Del. Ch. Oct. 15, 1997) ("Plaintiffs have failed to show why the written terms of the [partnership agreement] should be subject to some court-approved, after-the-fact, moralistic 'entirely fair' standard, when the parties defined the desired process in the Partnership Agreement and could have, but did not, require the General Partner to include the specific provisions that [expert witness] testified would be desirable in a purchase agreement negotiated at arms-length.").

suspect that they might be held liable: as the court of appeals conceded, it "ha[d] never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty." Pet. App. 34a. And the supposed victims of petitioners' conduct were sophisticated investors who were advised by the Goldman Sachs investment bank and the Gibson Dunn law firm. *See id.* at 64a. When, under these circumstances, the Georgia Court of Appeals manages to find "especially reprehensible" conduct meriting a quarter-billion-dollar fine (on the theory that it "revealed a callous indifference to the financial well-being of [the] limited partners," *id.* at 12a-13a), one ought to worry about the punitive award the court of appeals might approve in a case involving, say, a pattern of knowing safety violations resulting in bodily harm to helpless victims.

As for the second guidepost (concerning the relationship between punitive damages and harm), the court of appeals said only that "the ratio of compensatory to punitive damages is 1-to-1.3," and that it saw "no 'shocking disparity' inherent in this figure." Pet. App. 14a. The court of appeals did not address any of petitioners' arguments concerning this guidepost. Thus, the court ignored that, where there is a large compensatory award (here, almost $200 million), a lower punitive-to-compensatory ratio is required.[13] The court of appeals further ignored

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[13] *See BMW*, 517 U.S. at 582 ("low awards of compensatory damages may properly support a higher ratio than high compensatory awards"); *Inter Medical Supplies, Ltd. v. EBI Medical Sys., Inc.*, 181 F.3d 446, 467-68 (3d Cir. 1999) ("[H]igh, easily calculable compensatory damages may more appropriately be accompanied by a lower punitive damages ratio."); *Continental Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641-42 (10th Cir. 1996) ("[I]n commercial litigation like that before us the actual and potential damages are likely to be substantial, and thus punitive damages awarded on even a modest multiplier generally will be enough to gain the defendant's attention

that a lower ratio is called for when the compensatory award already has a deterrent effect.[14] That was plainly true here: the compensatory award of almost $200 million went well beyond disgorgement of any gain petitioners could conceivably have received because of their conduct. In particular, respondents have never explained how the installation of a $9 million ride could somehow increase the value of the Six Flags park by $150 million overnight.[15]

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and alter its future behavior."); *Earnest v. Truck Insurance Exchange*, No. G027505, 2002 WL 31689728, at *17 (Cal. Ct. App. Nov. 26, 2002) ("relatively high compensatory damage award calls for a lower ratio between compensatory and punitive damages than a low compensatory award where, for example, a particularly egregious act has resulted in only a small amount of economic damages") (internal quotation marks omitted).

[14] As one federal court of appeals noted, "if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him 'only' $10,005 and he was not otherwise punished." *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001). . In such cases, a defendant would "reasonably, were there no punishment, be deterred . . . by its actual expenses." *Id.*; *see also Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 206 (1st Cir. 1987) ("The large compensatory damage award [$300,000], by itself, provides significant deterrence, even to employers as large as Anheuser-Busch.").

[15] Assuming that, as respondents charged, petitioners had short-changed the park by one ride, any rational bidder in a sale of the park would have recognized that profits in prior years had been lower than they should have been, and would therefore have based his bid on an estimate of profits that would have been earned with one additional ride (minus the cost of that ride). Respondents' "multiplier" theory is therefore utterly "unrealistic." *Cooper*, 532 U.S. at 442; *see also Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 513 (Ky. 2002) (Cooper, J., dissenting) ("The ratio should not be determined by measuring the punitive damages award against the unproved compensatory damages awarded by the same 'runaway' jury that rendered the punitive damages verdict but against the *actual* damages proven by the evidence.").

The court of appeals similarly wrecked *BMW*'s third guidepost, which requires a comparison to other sanctions. The court of appeals did not identify any Georgia statute threatening a penalty for a breach of fiduciary duty among partners. It could not have, because none exists. Instead, the court relied on statutes addressing altogether disparate conduct (*e.g.*, the state RICO statute) on the theory that those statutes addressed "generally corrupt corporate behavior." Pet. App. 15a. But, if that remote degree of similarity were enough, the third guidepost — indeed, all of *BMW* — would be a nullity.

D. The Georgia Supreme Court's rules require it to hear "cases of great concern, gravity, or importance to the public." Ga. Sup. Ct. Rule 40. Given the court of appeals' defiance of a United States Supreme Court order, the enormity of the $257 million punitive award, and the important due process principles at stake, one might have expected the Georgia Supreme Court to have considered itself duty-bound to review the court of appeals' judgment, thereby obviating any need for this Court to allocate scarce resources to that end. But the Georgia Supreme Court denied certiorari without comment, just as it had before.

Regrettably, then, it falls to this Court to address defiance of federal law by Georgia's intermediate appellate court. In light of the court of appeals' defiance, summary reversal is appropriate.[16] The Court should rule that, as a

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[16] *See, e.g.*, *Powell v. Texas*, 492 U.S. 680, 681 (1989) (per curiam) (summarily reversing where, on remand from GVR, state court reinstated its prior decision on waiver rationale); *Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (per curiam) (summarily reversing decision on remand from GVR where court of appeals had "misapprehended our holding"); *INS v. Miranda*, 459 U.S. 14, 19 (1982) (per curiam) (summarily reversing where court of appeals distinguished decision in light of which case had been GVR'd in a way that was "unpersuasive"); *Hutto v. Davis*, 454 U.S. 370, 374-75

matter of federal due process, the conduct for which petitioners were held liable simply cannot support a punitive damages award of $257 million. With that correction, the Court can remand to the Georgia courts for a *de novo* determination of the maximum amount permitted. *Cf. BMW*, 517 U.S. at 585-86; *Cooper*, 532 U.S. at 443.

II. IN THE ALTERNATIVE, PLENARY CONSIDERATION IS APPROPRIATE TO REVIEW THE COURT OF APPEALS' *BMW* ANALYSIS.

If the Court is not inclined to reverse summarily, the same grounds relied on above also militate in favor of plenary review: the Court should grant certiorari to review whether the Georgia Court of Appeals properly followed this Court's directive to conduct a *de novo* review of the punitive award's constitutionality.[17] Plenary review would also allow the Court to address conflicts of authority

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(1982) (per curiam) (summarily reversing court of appeals' decision on remand from GVR where "the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress"); *Fontaine v. California*, 390 U.S. 593, 595 (1968) (per curiam) (summarily reversing where, after GVR, intermediate state appellate court reinstated its decision on harmless-error grounds); *see also Williams*, 520 U.S. at 1134 (Scalia, J., dissenting from denial of certiorari) ("I think it important to the dignity of this Court and the integrity of its processes to set aside what can only be regarded as an intentional evasion of its decrees. I would grant the petition for certiorari, summarily reverse the judgment of the Supreme Court of California, and remand for further proceedings.").

[17] *See, e.g., Ford v. Georgia*, 498 U.S. 411 (1991) (on plenary review, reversing where Georgia Supreme Court had invented waiver ground to avoid application of precedent for whose consideration this Court had GVR'd); *Yates v. Aiken*, 484 U.S. 211, 214 (1988) ("We granted certiorari because we were concerned that the South Carolina Supreme Court had not fully complied with our [GVR] mandate.").

concerning two questions that have arisen under *BMW*'s third guidepost.

First, *BMW* recognizes that, where particular conduct is punishable only by small statutory fines, a defendant lacks "fair notice" that it might be subject to "a multimillion dollar penalty." *BMW*, 517 U.S. at 584. Treble-damages statutes similarly cannot provide fair notice of the potential of a large punitive award. As this case illustrates, the vagaries of jury trials can cause compensatory damages to balloon, particularly when applicable law does not limit compensatory damages to foreseeable injury.[18] Thus, courts have generally reserved their treatment of treble damages statutes for the ratio guidepost.[19] Yet, the court of appeals held that Georgia's RICO statute put petitioners on notice of punishment up to $600 million — three times the unrealistic compensatory award in this case. *See* Pet. App. 15a.[20] The issue is particularly significant because numerous States have treble-damages statute that, on the reading adopted below, would in many cases render the

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[18] *See generally Restatement (Second) of Torts* § 435(1) (1965) ("[T]he fact that the actor neither foresaw nor should have foreseen the extent of the harm . . . does not prevent him from being liable.").

[19] *See, e.g., Clark v. Metropolitan Health Found., Inc.*, 90 F. Supp. 2d 976, 986 (N.D. Ind. 2000) (citing *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1287 (7th Cir. 1995)); *EEOC v. CEC Entm't, Inc.*, No. 98-C-698-X, 2000 WL 1339288, at *19 (W.D. Wis. Mar. 14, 2000). Indeed, in considering the Alabama Deceptive Trade Practices Act relevant in *BMW*, this Court placed weight only on its fixed penalty, even though the statute was also punishable by treble damages. *See BMW*, 517 U.S. at 584; *see also* Ala. Code §§ 8-19-11(b) ($2,000 fine), 8-19-10(a)(2) (treble damages).

[20] *See also Ford Motor Co. v. Sperau*, 708 So.2d 111, 121-22 (Ala. 1997) (relying on same treble-damages statute that this Court left aside in *BMW*).

third guidepost a meaningless repetition of the second ('ratio') guidepost.

Second, the court of appeals also erred in declining to consider the absence of any punitive damages awards in prior cases even approaching the size of that here. When awards in prior cases have been small, a large award raises concerns of "fair notice," *BMW*, 517 U.S. at 584, and risks denial of "'the uniform treatment of similarly situated persons that is the essence of the law itself,'" *Cooper*, 532 U.S. at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). If, as many courts have held, large prior awards can help sustain a large award,[21] then the absence of large prior awards equally militates against a large award.[22] Yet, the Georgia Court of Appeals held that it need not consider punitive damages awards in other cases.

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[21] *See, e.g., Kentucky Farm Bureau Mut. Ins. Co. v. Rodgers*, No. 2001-CA-000152-MR, 2002 WL 31045356, at *8 (Ky. App. Sept. 13, 2002); *Central Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 284-85 (Alaska 2002); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 47 (Tex. 1998).

[22] *See, e.g., Earnest v. Truck Insurance Exchange*, No. G027505, 2002 WL 31689728, at *17 (Cal. Ct. App. Nov. 26, 2002) ("the size of the award compared to those imposed in other bad faith cases as of 1991 is excessive; thus [defendant] could not reasonably expect the type of conduct it exhibited here to subject it to such a large award"); *EEOC v. Mid-Continent Sec. Agency, Inc.*, No. 99C5381, 2001 WL 800089, at *5 (N.D. Ill. July 12, 2001) ("To the extent that comparisons between disparate cases can provide guidance, both of these cases suggest that the jury's award of $184,000 in this case was grossly excessive."); *Komlosi v. Fudenberg*, No. 88 Civ. 1792 HBP, 2000 WL 351414, at *19 (S.D.N.Y. Mar. 31, 2000) ("A survey of the punitive damages awards in other malicious prosecution cases clearly demonstrates the excessive nature of the punitive damages awarded against defendant."); *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 513 (Ky. 2002) (Cooper, J., dissenting) (disapproving of award that was "almost three times greater than any previously reported award of punitive damages in Kentucky").

See Pet App. 14a n.9.[23] Where courts do not perform a comparison to other punitive damages awards, the predictability and uniformity intended by *BMW* will be thwarted.

III. AT A MINIMUM, THIS COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *STATE FARM*.

If the Court is disinclined to reverse summarily or set this case for plenary argument, the Court should at a minimum first hold and then GVR in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289, just as it previously GVR'd in light of *Cooper*.

The similarities between this case and *State Farm* are striking. In *State Farm*, just as in this case, the plaintiffs based their suit on a supposed breach of a fiduciary duty: State Farm was alleged to have committed such a breach by handling an insurance claim in bad faith. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2001 WL 1246676, at *3, *13, *18 (Utah Oct. 19, 2001), *cert. granted*, 122 S. Ct. 2326 (2002). The *State Farm* plaintiffs likewise won an enormous punitive damages award ($145 million) that a state court upheld in the face of a *BMW* challenge. *See id.* at *6-*18.

Just as this case, then, *State Farm* concerns the proper application of the *BMW* guideposts to outsized punitive damages awards in cases involving purely economic harm. Although *State Farm* also presents an "extraterritoriality" issue, most of the briefing in the case has centered on how the three *BMW* guideposts should be applied to the facts of

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[23] *See also Sumitomo Corp. v. Deal*, 569 S.E.2d 608, 616 (Ga. Ct. App. 2002), *cert. denied*, S02C1838, 2002 Ga. LEXIS 979 (Ga. Oct. 28, 2002).

the case.[24] More specifically, *State Farm* crisply raises the question of the level of similarity that is required between a defendant's actions and the conduct proscribed by statutes considered under the third *BMW* guidepost. According to the petitioner in *State Farm*, "the Utah Supreme Court misapplied the *BMW* analysis by including in its consideration of this guidepost penalties for a host of conduct other than the underlying conduct toward plaintiffs," including "multiple instances of various allegedly fraudulent types of conduct," and a "list of criminal offenses [that] contains no offense that could conceivably constitute comparable conduct." Brief for Petitioner at 38, 39, No. 01-1289.[25] As already explained, petitioners here assert that the Georgia Court of Appeals committed the same error.

If the claims of the *State Farm* petitioner prevail even in part, this Court's decision in *State Farm* will constitute an "intervening development[]" that "may determine the ultimate outcome of the litigation" here. *Lawrence v. Chater*, 516 U.S. at 167. A GVR will therefore be

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[24] See, e.g., Brief for Petitioner at 28-41, No. 01-1289 (U.S. filed Aug. 19, 2002); Brief for Respondent at 11-27, No. 01-1289 (U.S. filed Oct. 17, 2002); Reply Brief for Petitioner at 9-17, No. 01-1289 (U.S. filed Nov. 18, 2002).

[25] *See also* Brief of the American Tort Reform Ass'n as Amicus Curiae in Support of Petitioner at 23-25, No. 01-1289 (U.S. filed Aug. 19, 2002) (in applying the third *BMW* guidepost, "[t]he Court's invocation of [certain] statutory penalties was erroneous because, for example, there was no claim asserted in this case of a violation of the Utah RICO statute," and the court erroneously considered only maximum statutory penalties, instead of "realistically likely penalties"); Brief of Certain Leading Business Corporations as Amici Curiae in Support of Petitioner at 29-30, No. 01-1289 (U.S. filed Aug. 19, 2002) (arguing that the Utah Supreme Court erroneously ignored "the only readily comparable sanction," and instead "focused on hypothetical multiple penalties for alleged harm to others or [other] wildly unlikely penalties").

required. *See id.* at 167-68. A GVR could also "serv[e] as a cautious and deferential alternative to summary reversal." *Id.* at 168.

CONCLUSION

The petition for a writ of certiorari should be granted.

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